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IN THE

Supreme Court of the United States

October Term, 1961

No. 234

MARIE BENZ,
Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
Respondent

BRIEF FOR THE PETITIONER

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No. 234

MARIE BENZ,

Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Opinions Below

The memorandum opinion of the Supreme Court of the State of New York is unreported (R. 5-11). The memorandum of the Appellate Division of the Supreme Court is reported at 11 App. Div. 2d 906, 205 N. Y. S. 2d 1004 (R. 28).

The majority and dissenting opinions of the Court of Appeals of the State of New York are reported at 9 N. Y. 2d 486, 215 N. Y. S. 2d 47, 174 N. E. 2d 727 (R. 32-37).

Jurisdiction

The judgment of the Court of Appeals of the State of New York was made and remitted to the Supreme Court of the State of New York on April 27, 1961 (R. 37). The judgment of the Court of Appeals of the State of New York became the judgment of the Supreme Court of the State of New York by an order dated May 8, 1961, which was entered in the Office of the Clerk of the County of Erie on that date. An order amending the Remittitur was granted on October 5, 1961 (R. 38). The petition for a writ of certiorari was filed July 17, 1961 and was granted October 23, 1961 (R. 41). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3) [Since the petitioner has been deprived of her property without just compensation (*i.e.* due process of law)].

Constitutional Provisions and Statutes Involved

The Constitutional provisions involved in this case is U. S. Const., Article XIV, Sec. 1, "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

Article 1, Sec. 7 (a), and Article VI, Sec. 1 of the New York State Constitution, the Fifth and Eleventh Amendments, to the United States Constitution, Section 347, Subdivisions 5 and 5-a of the New York Highway Law and Sections 352 and 358 of the New York Public Authorities Law are also involved and the pertinent text is set forth in Appendix A, *infra*.

Questions Presented

1. Whether a citizen receives the due process of law guaranteed by the Fourteenth Amendment to the Federal

Constitution when her land has been appropriated by a New York State Public Authority and, due to a mistake of fact or the fraud of an agent of the said Authority, acting within the scope of his employment, she is to receive only one-twentieth of its value as compensation.

2. Whether the just compensation requirement embodied in the Due Process Clause of the Fourteenth Amendment overrides a state's immunity from suit so as to give state courts jurisdiction over an action by a defrauded citizen to rescind or reform a contract by which she is to be paid only one-twentieth of the value of her land which a State Public Authority had previously appropriated.

3. Whether the sovereign immunity of New York State can insulate the New York State Thruway Authority from suit for rescission or reformation of a contract wherein a citizen has been fraudulently deprived of her property without just compensation, while at the same time the Authority retains the benefits of that contract.

4. Whether the State of New York can, without violating the Due Process Clause of the Fourteenth Amendment, confer all the immunity from suit which it possesses on the New York Thruway Authority when the latter fraudulently deprives a citizen of just compensation after it has appropriated her land.

Statement of the Case

Petitioner owned certain property which the respondent appropriated for construction of a portion of the New York State Thruway. The appropriated land bisected the total tract of land owned by petitioner, and, as a result of the appropriation, a major part of the remainder became inaccessible (R. 13).

Subsequent to the appropriation and after much negotiation, petitioner and one William Hennessy, a proper agent of the respondent, agreed that the total compensation petitioner would receive would be $3,500.00 plus 90% of the value of the rear tract of petitioner's land which had been severed from the front tract, plus an added sum to compensate petitioner for the purchase of an access route to the said rear tract (R. 13). Thereupon they entered into the agreement which petitioner seeks to rescind or reform (R. 12).

Although that agreement sets forth only the sum of $3,500.00 and purports to be in full payment, the said Hennessy, at the time of its execution, specifically told petitioner that it was for only part of the compensation she would receive; this was in fact false and he knew it to be false at that time (R. 15). The sum of $3,500.00 represents approximately one-twentieth of the total value of the land appropriated (R. 14).

Subsequently, representatives of respondent repeated the misrepresentations of Hennessy, and the petitioner and her husband, being elderly people, relied upon these representations from the New York State Thruway Authority (R. 14).

Petitioner was not advised of the true import of the said agreement until she contacted an attorney (R. 15). Promptly thereafter, she brought the action in the Supreme Court of the State of New York to reform or rescind the contract. She has consistently refused to accept the $3,500.00 until the balance due her is also paid.

Respondent appeared specially and moved to dismiss the complaint on the ground that the respondent enjoys the same sovereign immunity as the State of New York itself, and that such immunity bars an action of this na-

ture. The Supreme Court of the State of New York accepted this theory and dismissed the complaint on the ground of lack of jurisdiction over the subject matter (R. 5). The Appellate Division unanimously affirmed. The Court of Appeals of the State of New York, in a four to three decision, affirmed the judgment of the Appellate Division (R. 32).

In an order amending the Remittitur (R. 38), the Court stated that upon the appeal before that Court there was presented and necessarily passed upon a question under the Constitution of the United States, *viz.* "Whether plaintiff was deprived of just compensation in violation of the due process clause of the Fourteenth Amendment. The Court of Appeals held there was no such deprivation or violation."

The Supreme Court of the United States granted certiorari (R. 41).

Summary of Argument

It is the contention of the petitioner that once having had her land taken from her by the exercise of the power of eminent domain by the respondent, the duty then fell upon the respondent to pay to the petitioner "just compensation" for the property taken. This right of just compensation is constitutionally guaranteed to the petitioner by the Fourteenth Amendment.

The agreement fixing the petitioner's compensation for the land taken was fraudulently arrived at and thus does not give her the "just compensation" to which she is entitled. The State of New York holds that there is no remedy for the petitioner in this situation for the reason that the respondent is immune from legal action. Thus this

immunity, conflicting as it does with the constitutionally guaranteed right of "just compensation", must fall.

Petitioner claims, furthermore, that the state cannot constitutionally delegate its immunity to a Public Authority for such delegation would in fact result in the Public Authority having more immunity that the state itself; for in the last analysis, the state is responsible to the people, whereas a public corporation is directly responsible to no-one.

Petitioner further argues that even if the respondent did have the immunity of the sovereign, such immunity does not bar an action against a Public Authority for the deprivation of a constitutionally guaranteed right.

ARGUMENT

I

The Fourteenth Amendment to the Federal Constitution guarantees to the petitioner that she will receive just compensation for the property which has been taken from her.

A.

JUST COMPENSATION IS GUARANTEED TO A PERSON WHEN HIS LAND IS TAKEN.

Whenever a person's land is taken by the Federal Government under its power of eminent domain, the Fifth Amendment guarantees him that he will receive just compensation for the taking. The Due Process clause of the Fourteenth Amendment extends this guarantee to situations wherein land is taken by a state government.

Chicago, B. & Q. Ry. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897). The compensation is to be the equivalent of the owner's loss rather than the taker's gain. "Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken." *U. S. v. Miller*, 317 U. S. 369, 373, 63 S. Ct. 276, 87 L. Ed. 336 reh. gr. 318 U. S. 798, 63 S. Ct. 557, 87 L. Ed. 1162 (1942); *U. S. ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 281, 63 S. Ct. 1047, 87 L. Ed. 1390 (1933).

> "The noun 'compensation' standing by itself, carries the idea of an equivalent * * *. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just'. There can, in view of the combination of those two words, be no doubt that the *COMPENSATION MUST BE A FULL AND PERFECT EQUIVALENT FOR THE PROPERTY TAKEN.*" (Emphasis supplied.) *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, 326, 13 S. Ct. 622, 37 L. Ed. 463 (1893).

So also in *United States v. Commodities Trading Corp.*, 339 U. S. 121, 124, 70 S. Ct. 547, 94 L. Ed. 707 (1950), the Court said that "the word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' ". Naturally, if a state itself must pay just compensation when it takes land, *a fortiori*, an agency of the state to which it has delegated its power of eminent domain is likewise required to pay just compensation when it takes private land.

When payment is not made until after the taking occurred, just compensation must include not only the value at the time of taking but also an amount sufficient to

produce the full equivalent of that value paid contemporaneously with the taking and interest is usually an accurate measure of that amount. *U. S. v. Klamath Indians*, 304 U. S. 119, 123, 58 S. Ct. 799, 82 L. Ed. 1219 (1938); *Jacobs v. U. S.*, 290 U. S. 13, 16-17, 54 S. Ct. 26, 78 L. Ed. 142 (1933).

B.

JUST COMPENSATION SHOULD OVERRIDE SOVEREIGN IMMUNITY.

The Eleventh Amendment to the Federal Constitution reads:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This amendment has been construed to extend to suits against a state in federal courts by citizens of the same state, *Hans v. State of Louisana*, 134 U. S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1889), and indeed a notion of the sovereign immunity of states is found in state constitutions and pervades in state courts.

Strictly construed, such a notion would seem to render nugatory the just compensation guarantee of the Fourteenth Amendment, for in order for a person to receive his just due, it is oftentimes necessary to sue the sovereign. An express conflict between these two, however, has never had to be resolved in the federal courts.

Yet several state courts have had occasion to consider this problem. Admittedly many, though not all, of these cases have dealt with a guarantee of just compensation

as found in their State Constitution rather than in the Federal Constitution. Whether such a provision is found in a State or Federal Constitution, however, the essential theory behind it remains the same and the reasoning applicable to one should be equally as cogent when applied to the other.

The succinct reasoning of the Court in *Chick Springs Water Co. Inc. v. State Highway Dept.*, 159 S. C. 481, 497-98, 502, 157 S. E. 842, 848, 850 (1930) is directly in point:

> "* * * neither the commonwealth nor any of its political subdivisions, is liable in action *ex delicto* unless made liable by express enactments of the General Assembly *EXCEPT WHERE THE ACTS COMPLAINED OF, IN EFFECT, CONSTITUTED A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION.* * * * [They] are held liable where they take property, not upon the ground that they are authorized by statute to be sued, but because of the constitutional provision requiring compensation to be made for such taking. This protection is afforded to the humblest citizen by the Constitutions of the State and the United States and neither government can itself or by any statute or through any agency take property without paying compensation. 'Immunity from suit' cannot avail in this instance. * * * To hold otherwise would be to say that the Constitution itself gives a right which the Legislature may deny by failing or refusing to provide a remedy. *SUCH A CONSTRUCTION WOULD INDEED MAKE THE CONSTITUTIONAL PROVISION A HOLLOW MOCKERY INSTEAD OF A SAFEGUARD FOR THE RIGHTS OF CITIZENS.*" (Emphasis supplied.)

Thus, this case specifically held that the just compensation provisions of the State *and Federal* Constitutions are an exception to the notion of a sovereign immunity *as A matter of constitutional right;* therefore, this was not based

on merely the procedural requirements of the state involved.

Many other states have supported this reasoning in opinions by their highest courts. Louisiana has held that because of the just compensation provision of their constitution, any agency of the state which has taken or damaged private property for public use without paying adequate compensation can be sued for such irrespective of the non-existence of a legislative authorization for the suit. *Cope v. La. State Live Stock Sanitary Board*, (La.), 176 So. 657 (1937). Connecticut has found that its constitutional provision for just compensation allows suit, and no other specific permission to sue is necessary when the state takes property. *Anselmo v. Cox*, 135 Conn. 78, 60 A. 2d 767 (1948). Likewise, California has found its just compensation provision to be a restriction upon the state itself which is self-executing, and legislative inaction does not allow the state to violate it. *Rose v. State* (Cal.), 105 P. 2d 302 (1940). In accord with these States, Oregon agrees that the property holder whose constitutional rights have been injured has a common law remedy in the absence of a statute. *Thomasek v. State*, 196 Ore. 120, 248 P. 2d 703 (1952). For further support of this argument see also *Renninger v. State* (Ida.), 213 P. 2d 911 (1950); *Lehman v. Williams*, 301 Ky. 729, 193 S. W. 2d 161 (1946); *cf. State v. Stanley*, 188 Minn. 390, 247 N. W. 509 (1933).

Many of these cases based their conclusions on the fact that the state constitutional provision of just compensation was self-executing, *i.e.* there is a manifest intention that the provision should go into immediate effect so that no ancillary legislation is necessary to the enjoyment of the right given and the enforcement of the duty imposed.

12 *Corpus Juris* 732. Since it was decided in *Jacobs v. U. S.*, 290 U. S. 13, 54 S. Ct. 26, 78 L. Ed. 142 (1933) that the same provision in the Federal Constitution was also self-executing, a similar result should obtain in the instant suit and override any claim of sovereign immunity.

Indeed as Connecticut has held in *Anselmo v. Cox, supra*, p. 10, the provision for just compensation found in a constitution should be construed to be equivalent to an implied, or probably even an express, waiver of immunity or a consent to be sued.

Though ordinarily a state cannot be sued without its consent, an exception exists in actions against the state for compensation for property taken in that the constitutional provision for just compensation itself gives consent for the state to be sued and in such cases, no act of the Legislature is necessary to enjoy the right, nor can they by any act deny it. *Chick Springs Water Co. Inc. v. State Highway Dept., supra*, p. 9.

It is interesting to note that Article I, Section 7(a) of the New York State Constitution provides specifically that, "Private property shall not be taken for public use without just compensation".

If petitioner in the instant case had failed or refused to reach an agreement with the agent for the Authority as to the value to be paid her for her land, she would have had her day in court in a condemnation proceeding during which she would, in effect be suing the state. Here, however, because petitioner was willing to make an amicable agreement without requiring the Authority to go to court, she now finds, when the agreement turns out to be fraudulent rather than friendly, that she is in far worse position than she would have been if she had been unwill-

ing to settle her claim amicably. Indeed, as the New York Court of Appeals said in her case, she is "without any remedy". *Benz v. New York State Thruway Authority*, 9 N. Y. 2d 486, 490, 215 N. Y. S. 2d 47, 174 N. E. 2d 727 (1961). The objectionable inequity of this situation and its complete repugnance to the constitutional guarantee of "just compensation" is evident.

Actually, suits against the sovereign without any consent on its part have often been allowed under one guise or another. *The Siren*, 74 U. S. 152, 7 Wall 152, 19 L. Ed. 129 (1868), and *The Davis*, 77 U. S. 15, 10 Wall 15, 19 L. Ed. 875 (1869), both held that property of the United States can be subjected to maritime liens where such can be done without technically making the United States a party. In *Meigs v. McClung's Lessee*, 13 U. S. 11, 9 Cranch 11, 3 L. Ed. 639 (1815), and in *Wilcox v. Jackson, ex dem. McConnel*, 38 U. S. 498, 13 Pet. 498, 10 L. Ed. 264 (1839), the petitioner, who had been deprived of his property without just compensation, sued not for such relief as petitioner does here, but rather for the more extreme remedy of ejectment of the United States officials that were on his land. In both cases he was successful even though the use the land was being put to was as a military fort.

Another suit which is at least, in effect, directly against the sovereign is the use of the writ of *habeas corpus*—

> "The instances in which the life and liberty of the citizen have been protected by the judicial writ of *habeas corpus* are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the government • • •
>
> If this constitutional provision (Due Process) is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under

> the asserted authority of the Government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?" *United States v. Lee*, 106 U. S. 196, 218, 1 S. Ct. 240, 27 L. Ed. 171, 181 (1882).

Just as no consent is necessary to institute a writ of *habeas corpus* so also none should be necessary to sue for just compensation; or if it is necessary, it should be held to be supplied by the guarantee of just compensation. Any other interpretation would render the guarantee worthless.

It may be argued that petitioner has a remedy, *viz.* to personally sue the agent of the Thruway who committed the fraud. But when relatively large sums of money are involved, as in the instant case, to so limit the petitioner is to render her chances of recovery virtually impotent. It is not the individual agent who benefited by his fraudulent acts—it is the Thruway Authority. They have in effect ratified his actions by their continued possession of the land involved and their refusal to pay petitioner more than one-twentieth of the value of her land. Only by granting plaintiff the relief which she seeks in this action can "just compensation" be meaningful; it is not meaningful when it is the equivalent of an unsatisfiable judgment against a state employee of limited assets. To require petitioner to garnishee his wages for life was obviously not the intent of the framers of the Fourteenth Amendment.

This is a suit for rescission or reformation of the complaint even though it also contains an omnibus relief clause under which damages can be awarded (R. 16). Naturally, a suit against the agent would not avail to correct the defective agreement The Court of Appeals has made it clear that having once signed this agreement, regardless of the fraud or undue influence used, the plaintiff is "with-

out any remedy". *Benz v. New York State Thruway, supra*, p. 12. New York makes no provision to protect the rights of its citizens in this situation.

It is therefore necessary that the federal courts offer this protection in regard to the rights guaranteed by the Fourteenth Amendment. Just as the power of eminent domain is limited by the requirement of "just compensation", *Hanson Lumber Co. v. U. S.*, 261 U. S. 581, 43 S. Ct. 442, 67 L. Ed. 809 (1923), so also should be the "power" of sovereign immunity. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510 (1913) makes it clear that the reach of the Fourteenth Amendment is coextensive with *any* exercise by a state of power, *in whatever form exerted.* This case also makes it clear that regardless of whether the suit is against the agent or the authority or the state, the reach of the Fourteenth Amendment is broad enough to reach not only the states but also "every person, whether natural or juridical, who is a repository of state power". 227 U. S. at page 286.

> "In other words, the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that States, acting in their governmental capacity, in a complete sense, may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, *provided against all and every* such possible contingency. Thus the completeness of the Amendment in this regard is but the complement of its comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed." *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, 288, 33 S. Ct. 312, 315, 57 L. Ed. 510 (1913) (Emphasis supplied).

There is no reason why the states should be any more immune from an attack under the Fourteenth Amendment for a deprivation of property without just compensation than they are in the broader field of civil rights. *Neal v. State of Delaware*, 103 U. S. 370, 26 L. Ed. 567 (1880); *Brown v. Board of Education of Topeka*, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1954).

II

Even if the state itself is immune from suit, it cannot delegate its immunity to its public corporations, such as the Thruway Authority.

Even if we assume for the purpose of argument that the state itself is protected in this case by a cloak of immunity, it cannot extend this freedom from suit to agencies and subdivisions it creates. This court has so held in the case of *Hopkins v. Clemson College*, 221 U. S. 636, 31 S. Ct. 654, 55 L. Ed. 890 (1911). In that case, plaintiff landowner sued the defendant for damages to his farm and that defendant be required to abate and remove a dyke. Just as the New York courts have done in the instant case, the South Carolina court there interposed the immunity of the sovereign on behalf of a body, corporate and politic, created by the sovereign (Clemson College), when that body was sued for the violation of a constitutional right. Upon reaching this Court, the error in that reasoning was pointed out as the court held that the defendant college, as well as all other public corporations and political subdivisions, although agencies of the state, are not clothed with that immunity from suit which belongs to the state alone; and while they may be relieved from responsibility to a greater degree than individuals, they cannot rely on immunity as can the state.

The mere fact that the enabling statute and the state court say that an agency is an instrumentality of the state exercising an essential government function is not decisive in giving it the protection of the Eleventh Amendment. *Lowes v. Pa. Turnpike Commission*, 125 F. Supp. 681 (1954).

> "The Eleventh Amendment was not intended to afford them (agents of the state) freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. * * * The whole frame and scheme of the political institutions of this country, state and Federal, protest against extending to any agent the sovereign's exemption from legal process." *Hopkins v. Clemson College*, 221 U. S. at page 643, 31 S. Ct. at page 656.

The issue in *Hopkins* was specifically stated to be "whether a public corporation can avail itself of the State's immunity from suit" 221 U. S. at page 642, 31 S. Ct. at page 656, and the answer was found to be in the negative.

In analogous situations the state's immunity has been held not to extend to (a) state commissions in actions to restrain them from enforcing a statute which illegally burdened interstate commerce, *McNeill v. Southern Ry.*, 202 U. S. 543, 26 S. Ct. 722, 50 L. Ed. 1142 (1905); *Mississippi Railroad Commission v. Illinois Central R. R.*, 203 U. S. 335, 27 S. Ct. 90, 51 L. Ed. 209 (1906); (b) state banks, *Bank of Ky. v. Wister*, 22 U. S. 904, 9 Wheat. 904, 6 L. Ed. 244 (1824); (c) counties, *Lincoln County v. Luning*, 133 U. S. 529, 10 S. Ct. 363, 33 L. Ed. 766 (1890); (d) ports, *Port of Seattle v. Oregon & W. R. Co.*, 255 U. S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921).

In the *Port of Seattle* case *supra*, the criterion used in determining whether the state's immunity extended to the port was whether the latter had an independent financial

interest in the property involved. Since the port sold permits to construct wharves and used most of the proceeds to benefit the port, its financial interest was held to be sufficiently independent to take it out of the protection of the Eleventh Amendment. In the instant case the Thruway Authority charges tolls for use of its roads and applies the proceeds to the cost and maintenance of said roads; hence it too has an independent financial interest in the property involved in suit and should not come within the ambit of the protection of the Eleventh Amendment.

III

The extension of the doctrine of sovereign immunity to the Public Authority will open the door to uncontrolled abuse of the rights of the citizen.

The most significant and consequential development in governmental law in recent years has been the rapidly increasing creation of public authorities by governmental units. Edelstein, *The Authority Plan—Tool of Modern Government*, 28 Cornell L. Q. 177. New York State alone has created over one hundred public authorities representing a multi-billion dollar operation. Legislative Document (1956) No. 46, *Staff Report on Public Authorities Under New York State* (hereafter cited as *New York Report*), 5.

The reasons given for the continued and expanding use of the Public Authority were well expressed by President Harry S. Truman in his 1948 Budget Message when he said, "* * * experience indicates that the corporate form of organization is peculiarly adapted to the administration of governmental programs which are predominantly of a commercial character ____ those which are revenue

producing, are at least potentially self sustaining, and involve a large number of business-type transactions with the public." *The Budget of the United States Government for the Fiscal Year Ending June 30, 1948*, M61 (1947).

The administrative reasons for the formation of Public Authorities are expanded upon at great length in the *New York Report:*

> "The functions of public authorities in New York State are chiefly enterpreneurial in character. The operation of public enterprises may require more management flexibility than can be obtained under the usual administrative organization of regular government. In addition, the autonomy of the public authority is believed to lessen the dangers of partisan interference with long-range capital enterprises. The relatively independent administration possible in public authority operations has been a major factor in the creation of most authorities in New York State. *New York Report*, 54."

The powers of a Public Authority are broad. They issue revenue bonds, fix tolls and other charges, take land by eminent domain, enter contracts, lease or purchase appropriate facilities and occasionally police their facilities and issue regulations enforced by penal sanctions. NOTE: 74 Harv. L. Rev. 714.

They usually have the power to sue and be sued, have a seal, hire officers and employees, make by-laws and to manage their own affairs and all the other powers customarily associated the private business. Council of State Governments, *Public Authorities in the States*, 39 (1953).

> "Under the influence of public authorities, an impetus of immense proportions has given rise throughout the nation to legislative programs calling for the construction and development of highways and bridges, water resources and hydroelectric projects, ports and terminals, schools and hospitals, office buildings, util-

> ity systems, and a multitude of other institutional facilities. Gerwig, *Public Authorities: Legislative Panacea?*, 5 J. Pub. L. 387."

The rapid rise of the Public Authority did not go unnoticed nor was it viewed with unmixed emotions. The New York State Constitutional Convention of 1938 considered the question of the rapid expansion of the Public Authority with concern. The Constitutional Convention Committee of 1938 observed:

> "* * * Sometimes the activities of an authority transcend in financial scope the activities of a whole town or village, but they have none of the elements of popular control which accrue as a matter of course to the town or villages. *Report of the Constitutional Convention Committee*, Vol. IV, 1938, p. 191."

This concern naturally arose because the most important single attribute of the Public Authority was its autonomous character.

> "By selecting the Public Authority in preference to a regular governmental unit as the agency for the development of business type projects, a state may by-pass restrictive constitutional provisions, or judicial decisions, and escape from the traditional caution and red tape of bureaucracy. Gerwig, *supra*, 5 J. Pub. L. 387, 390."

The corporate entity of the Public Authority was interposed, "to protect the state from liability and enable public projects to be carried on free from restrictions otherwise applicable." *Plumbing, Heating, Piping and Air Conditioning Contractors Association, Inc. v. New York State Thruway Authority*, 5 N. Y. 2d 420, 423, 185 N. Y. S. 2d 534 (1959). They are not directly responsible to the state, or local government or to the People of the state. *New York Report* 84. The members of these Authorities are appointed for very long terms, generally longer than the

term of the Governor who appointed them. Members of the New York State Thruway Authority, for example, are appointed for a term of nine years. New York *Public Authorities Law*, Section 352; NOTE: *The Applicability of Sovereign Immunity to Independent Public Authorities*, 74 Harv. L. Rev. 714, 720.

The dangers inherent in this autonomy which is so much a part of the concept of the Public Authority led one author to conclude:

> "Thus in its pristine nature the authority concept is admittedly valid. Where in practice, however, either its autonomous political character or allegedly authorized functions degenerate into legal fictions, the foundation of propriety is seriously undermined. Gerwig, *supra*, 5 J. Pub. L. 387, 405."

Thus, for example, in 1956 in the *New York Staff Report* it was stated that too little basic information on authority operations was readily available to either the public or responsible organs of state government. The report foresaw that the authorities might be reluctant to make this information regularly and fully available. *New York Report* 576. This fear reached fruition and indeed obtained judicial sanction in New York in the case of *New York Post Corp. v. Moses*, 10 N. Y. 2d 199, 219 N. Y. S. 2d 7 (1961). The *Moses* case relied on the *Benz* decision (*i.e.* the decision herein).

In addition, it should be noted that the Public Authorities, concerned as they are with their own self interest, perpetuate themselves as long as possible. No New York State Public Authority, for example, has ever voluntarily liquidated. *New York Report* 520.

The combination of self interest and political autonomy militates against the granting of sovereign immunity to the

Public Authority. Should the Public Authority be given the sovereign immunity of the states, they will have achieved a degree of autonomous irresponsibility which is unknown in our law.

The doctrine of sovereign immunity is at best a reluctant vestiage of an earlier era kept alive in the courts, frequently against the better judgments of the judges pronouncing the applicability of the doctrine. The authors of legal articles have been unanimous in their condemnation of the doctrine. Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 J. Pub. L. 1, and authorities collected therein; Stetser, *The Immunities of the State and Government Economic Activities*, 24 Law and Contemp. Prob. 291. See also, NOTE: 40 Minn. L. Rev. 234; NOTE: 42 Cornell L. Q. 540; NOTE: 45 Iowa L. Rev. 621. One author listed what he believed to be five compelling reasons for reform in this area of the law:

> "(1) The injustice of refusing judicial relief when government officers infringe the legal rights of a private party, (2) the impracticability of substituting force or political power for adjudication of controversies that courts are especially qualified to determine, (3) wasteful litigation which stems from judicial fluctuation from one line of authority to another, (4) the almost unbelievable lack of specific judicial inquiry into reasons for the basic doctrine, and (5) disappearance of the only reasons that supported the doctrine of sovereign immunity when the doctrine was introduced into American Law during the first half of the nineteenth century. Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages*, 40 Cornell L. Q. 3."

The trend against the doctrine has also been evident in the state courts—*e.g. Tompkins v. Kanawha Board*, 19 W. Va. 257 (1881) wherein the court likened a Public Authority having sovereign immunity to "a legalized despot tres-

passing upon the rights of the citizens, who would be powerless to protect themselves" (at page 263). The court in that case went on to say (19 W. Va. at pages 263-264):

> "* * * It would be against all our ideas of State government, if a corporation created by the State to carry on a work of improvement should not be liable like any other corporation for the damage it inflicted, notwithstanding the State might own the property of the corporation. Sovereignty does not reside in such a corporation. The State cannot delegate her sovereignty. There is no creature of the State above the law and irresponsibile. If this were so, the corporation might deny to certain individuals all benefits to be conferred by the corporation, and yet it being sovereign or representing sovereignty it could not be sued."

See also *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N. E. 2d 89 (1959) where the doctrine was called "mistaken and unjust"; *Hargrove v. Town of Cocoa Beach, (Fla.)*, 96 So. 2d 130 (1957) (doctrine was called "anachronistic"). It is not surprising, therefore, that the other states that have considered the doctrine of sovereign immunity in connection with their highway authorities have rejected it. *Taylor v. New Jersey Highway Authority*, 22 N. J. 454, 126 A. 2d 313 (1956); *State ex rel. State Highway Commission v. Bates*, 317 Mo. 696, 296 S. W. 418 (1927); *People v. Illinois State Toll Hwy. Comm.*, 3 Ill. 2d 218, 120 N. E. 2d 35 (1954).

The federal courts have also participated in the trend toward the diminution of sovereign immunity. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784 (1939); *Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp.*, 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762 (1922); see NOTE: 45 Iowa L. Rev. 621.

In view of this status of the law, the doctrine of sovereign immunity should not be extended to a Public Authority. As we have shown, a Public Authority is granted all of the privileges and powers of a corporation. In fact, in New York State, a Public Authority is specifically defined as a public corporation. New York *Public Authorities Law*, Section 352.

A government is, in the last analysis, responsible to the people of state. A Public Authority has no such responsibility. If it is held that it partakes of the immunity of the sovereign, then it will not be responsible to the courts. There is no creature known to the common law which has such a broad immunity. Extension of immunity into this area is contrary to all democratic principles and should not be countenanced by this Court.

New York has conferred upon the respondent herein the right to acquire real property by appropriation. New York *Public Authorities Law*, Sec. 358. Under this method of taking real property, the land becomes the property of the Authority or other taking body immediately upon the filing of the appropriate maps. New York *Highway Law*, Sec. 347, subdivisions (5) and (5a).

When this power is exercised, it is important that there be sufficient safeguards so that those landowners, who are being deprived in many cases of their most cherished possession, are afforded their Constitutional guarantee of "just compensation" for the land which is taken from them. If we are to permit these Authorities to procure land at an unfair price by whatever fraudulent or forceful methods their agents may use, and then allow them to hide behind the shield of state immunity when a landowner sues to receive his just due, the Constitutional

guarantee of "Just Compensation" will become meaningless.

These governmental agencies have already taken enormous amounts of private land; in the future it can be expected they will take much more.

The New York appropriation statute provides a method whereby the person whose land has been taken may enter into an agreement as to the value of the land. New York *Public Authorities Law*, Sec. 358. Under the decision in the Court below, this agreement stands regardless of the fraud or other unlawful means by which it may have been secured. It is apparent that many of those persons who will have their lands taken from them by the State will be elderly people such as the petitioner and her husband, or persons of lesser intelligence, or persons who would merely rely upon that degree of fairness which they would normally expect when dealing with their State or Federal Government. To protect such persons from being duped by the over-zealous or unscrupulous agent of the taking body, it is essential that immunity not exist in these cases. Otherwise, the floodgates will be open to a rash of abuses whereby the lifesavings of an individual may be swept away "without any remedy". *Benz v. New York State Thruway Authority*, 9 N. Y. 2d 486, 490, 215 N. Y. S. 2d 47, 49, 174 N. E. 2d 727 (1961).

IV

Even if the Court held that the New York State Thruway Authority partakes of the sovereign immunity of the state, such immunity will not bar the present action.

The holding of the New York Court of Appeals in this case is that the New York rules of sovereign immunity

effectively bar any legal action by a citizen who was fraudulently induced to sell her land to the Thruway Authority for one-twentieth of its value. Ordinarily questions of sovereign immunity are determined by state law. *Curran v. State of Arkansas*, 56 U. S. 304, 15 How. 304, 14 L. Ed. 705 (1851).

The Supreme Court, however, recognizes two very clear exceptions to the doctrine of sovereign immunity. Where the action of the official was effected under an unconstitutional statute, *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A., N. S. 932 (1908), and where the action was undertaken in an unconstitutional manner, *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 S. Ct. 699, 35 L. Ed. 363 (1891) the courts have not been stopped by the doctrine of sovereign immunity even though the actual effect has been to affect state action.

United States v. Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882) is perhaps the leading case on the constitutional exception to the doctrine of sovereign immunity. In that case the Court said (106 U. S. at page 220, 1 S. Ct. at page 260)—

> "* * * it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty, or property without due process of law, or to take private property without just compensation."

Nothing contained in *Larson v. Domestic & Foreign Commerce Corporation*, 337 U. S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949) lessens the force of the *Lee* case in relation to the present case. The Court in that case said (337 U. S. at page 704, 69 S. Ct. at page 1468)—

> "Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of

the Government, it is proper that the courts have the power to grant relief against those actions."

In the case at bar, the petitioner's property was taken from her without her consent by the exercise of the power of eminent domain. She then was induced by fraud to execute an agreement which inadequately fixed her compensation for the property which was taken. She expected fairness and truthfulness from the representative of her state government. (There is attached to this brief, as part of the Appendix, an article which appeared in the Western New York press indicative of the way in which such adjustments are handled. Although the article relates to a different state agency, the method of proceeding and the publicity given are the same. Appendix B, *infra*, p. 32.)

The plaintiff was not, however, treated fairly. She was deprived of just compensation by the fraud of the agent of the Thruway Authority. Fraud can never constitute due process of law, and compensation fraudulently determined is not just compensation. Petitioner has alleged fraud on the part of the respondent in the execution of the agreement wherein the compensation for her land was fixed and such allegation must be accepted as true for the purpose of this proceeding. *Locke v. Pembroke*, 280 N. Y. 430, 21 N. E. 2d 495 (1939).

Moreover, once the contract was signed by her, regardless of the fraud, undue influence, force or duress which may have been used, she was "without any remedy". *New York Post Corp. v. Moses*, 10 N. Y. 2d 199, 219 N. Y. S. 2d 7 (1961) makes it clear that the Benz case (the case at bar) stands for the proposition that Public Authorities are subjected only to those procedures which have been specifically mandated. The Court of Appeals in

the Benz case held specifically that no relief had been mandated in any way and that the petitioner was therefore "without any remedy". (9 N. Y. 2d at page 490, 215 N. Y. S. 2d at page 49.)

Thus, by reason of fraud, the petitioner has been unconstitutionally deprived of her property without just compensation. The New York Supreme Court is the court of general jurisdiction in law and equity under Article VI, Section 1 of the New York State Constitution. This court has the power given to it by the State Constitution to entertain this action. Indeed, prior to the decision in the Benz case, the New York Courts had held that the New York Supreme Court had jurisdiction over the Thruway Authority. *Pantess v. Saratoga Springs Authority*, 255 App. Div. 426, 8 N. Y. S. 2d 103 (1938); *Strang v. State*, 206 Misc. 734, 134 N. Y. S. 2d 871 (1954). Should this court reverse the decision of the Court of Appeals herein, the case would properly be heard by the New York Supreme Court.

The unconstitutional taking of the petitioner's property without just compensation and without remedy places this case squarely within the constitutional exception to the doctrine of sovereign immunity. It would not only be unconstitutional but also unconscionable if the petitioner were to have no redress. See 3 *Nichols On Eminent Domain*, 151; *O'Donnell v. Clinton*, 145 Mass. 461, 14 N. E. 747 (1888).

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Appendix A

United States Constitution, Fifth Amendment.

> "* * * nor shall private property be taken for public use, without just compensation."

United States Constitution, Eleventh Amendment.

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

New York State Constitution, Article 1, Section 7. (a).

> "Private property shall not be taken for public use without just compensation."

New York State Constitution, Article VI, Section 1.

> "The supreme court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the court of appeals as now is or hereafter may be prescribed by law not inconsistent with this article. * * *"

New York *Highway Law*, Section 347, Subdivision 5.

> "On the filing of such description and map in the office of the department of state, the people of the state of New York, their officers and agents, may immediately enter upon and take possession of the property so described for any and all purposes connected with the thruway system of the state of New York."

New York *Highway Law*, Section 347, Subdivision 5-a.

> "A copy of such description and map shall be filed by the superintendent of public works in the office of

the county clerk or register of each county in which such property, or any portion thereof, is situated and thereupon the appropriation by the state of the property described in such description and map shall be deemed complete and the title to such property shall become and be the property of the people of the state of New York."

New York *Public Authorities Law*, Section 352.

"1. A board to be known as 'New York state thruway authority' is hereby created. Such board shall be a body corporate and politic constituting a public corporation. It shall consist of three members appointed by the governor by and with the advice and consent of the senate. The members first appointed shall serve for terms ending three, six and nine years, respectively from January first next succeeding their appointment. Their successors shall be appointed for terms of nine years each. * * *"

New York *Public Authorities Law*, Section 358.

"1. On assuming jurisdiction of a thruway section or connection or any part thereof, or of a highway connection, the authority may from time to time determine what real property is necessary for the construction, improvement and operation thereof, in addition to real property theretofore acquired by the state. If funds are made available by the authority for payment of the cost and expense of the acquisition thereof, the superintendent when requested by the authority shall acquire such real property in the name of the state by appropriation, and, where necessary, remove the owner or occupant thereof and obtain possession according to the procedure provided by section three hundred forty-seven of the highway law. The authority shall have the right to possess and use for its corporate purposes so long as its corporate existence shall

continue all such real property and rights in real property so acquired.

"2 Claims for the value of the property appropriated and for legal damages caused by any such appropriation shall be adjusted and determined by the superintendent with the approval of the authority, or by the court of claims as provided in said section three hundred forty-seven. When a claim has been filed with the court of claims, the claimant shall cause a copy of such claim to be served upon the authority and the authority shall have the right to be represented and heard before said court. All awards and judgments arising from such claims shall be paid out of moneys of the authority."

Appendix B

BUFFALO EVENING NEWS, JUNE 22, 1961.

State Checking Title to Site of A-Waste Center.

Little Valley, June 22—A team of attorneys and examiners from the State Public Works Department is checking records in the Cattaraugus County Clerk's office to verify titles to 44 parcels in the Town of Ashford where a state nuclear service facility will be located.

The State Office of Atomic Development Monday took titles to the properties, totaling 331 acres, by filing an official map of the site.

It was disclosed that the owners of the 30 farms which were taken entirely as well as parts of 14 others will enjoy tax-free status until they are required to vacate. It was explained that the procedure automatically removes the property from the Town of Ashford tax rolls and transferred the titles to the state.

Occupancy to Continue

A spokesman said that the occupants may continue normal use of their tracts "at the pleasure of the state."

It was indicated that no one will be evicted before next spring.

The title searching formality was explained as a prelude to the property acquisition negotiations. *When this operation is complete, teams of representatives will deal with each property owner on the basis of "fair market values."* (Emphasis supplied.)

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